Supreme Court U.S.
FILED
FEB 17 2011
OFFICE OF THE CLERK

No. 10-660

IN THE
Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION, LLC,
Petitioner,

v.

FOX NEWS NETWORK, LLC, AND THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT FOX NEWS NETWORK, LLC

MATTHEW S. HELLMAN
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, D.C. 20001
(202) 639-6000

STEVEN G. MINTZ
Counsel of Record
MINTZ & GOLD LLP
470 Park Avenue South
New York, N.Y. 10016
(212) 696-4848
mintz@mintzandgold.com

QUESTIONS PRESENTED

1. Whether the Second Circuit correctly concluded that daily reports of borrowing from the Discount Window and other emergency lending programs established by the Board of Governors of the Federal Reserve System are government records, not information "obtained from a person" within the meaning of Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4).

2. Whether the Second Circuit correctly held that a federal agency's speculation regarding future harm to the effectiveness of its programs does not authorize the agency to withhold records under Exemption 4 of FOIA.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Fox News Network, LLC, owner of the Fox Business Network ("Fox Business"), states that News Corporation, a publicly held company which is publicly traded, is Respondent's ultimate parent. No other publicly held corporations own 10% or more of Respondent's stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 4

A. The FOIA Requests and the Board's Response. 4

B. Exemption 4 and the National Parks Test. 9

C. Proceedings Below. 11

D. The Dodd-Frank Act. 16

E. Intervention. 17

REASONS FOR DENYING THE WRIT 18

I. The Case is a Poor Vehicle for Considering the Questions Presented Because the Issues Are Already Largely Moot In Light of Superseding Legislation. 18

II. Review Is Unwarranted Because Petitioner's Claim Of A Circuit Split Is Unfounded. 20

III. Petitioner Lacks Standing To Assert Harm To The Effectiveness Of Federal Reserve Lending Programs. 24

IV. The Decision Below Was Correct On The Merits. 26

A. The Court of Appeals Correctly Found That the Remaining Term Reports and the Origination Reports Were Not "Obtained From a Person." 26

B. The Court of Appeals Correctly Declined to Recognize the "Program Effectiveness" Test 34

CONCLUSION 36

TABLE OF AUTHORITIES

Cases

9 to 5 Org. for Women Office Workers v. Bd. of Governors, 721 F.2d 1 (1st Cir. 1983) 10, 11, 21, 22, 24

American Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38 (D.D.C. 1998), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000) 26

Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262 (S.D.N.Y. 2009) 13

Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 143 (2d Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3271 (U.S. Oct. 26, 2010) (No. 10-543) ..... *passim*

Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392 (D.C. Cir.1980) 21

Buffalo Evening News v. Small Bus. Admin., 666 F. Supp. 467 (S.D.N.Y. 1987) 27

Canadian Commercial Corp. v. Dep't of Air Force, 514 F.3d 37 (D.C. Cir. 2008) 21

Clarke v. U.S. Dep't of Treasury, No. 84 Civ. 1873, 1986 WL 1234 (E.D. Pa. Jan. 28, 1986) 31

Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank of the U.S., 464 F. Supp. 804 (D.D.C. 1979) 31

Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 830 F.2d 278 (D.C. Cir. 1987) ..... *passim*

Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993) 11, 23

Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) 22, 32

Department of Air Force v. Rose, 425 U.S. 352 (1976) 9

Duncan v. Walker, 533 U.S. 167 (2001) 30

FOMC v. Merrill, 443 U.S. 340 (1979) ..... *passim*

Getman v. N.L.R.B., 450 F.2d 670 (D.C. Cir. 1971) 29

Hercules, Inc. v. Marsh, 839 F.2d 1027 (4th Cir. 1988) 24

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) 26

Inner City Press/Community on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239 (2d Cir. 2006) 29

Judicial Watch, Inc. v. Export-Import Bank, 108 F. Supp. 2d 19 (D.D.C. 2000) 30

Judicial Watch, Inc. v. FDA, 449 F.3d 141 (D.C. Cir. 2006) 28

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 26

McDonnell Douglas Corp. v. Nat'l Aeronautics and Space Admin., 180 F.3d 303 (D.C. Cir. 1999) 21

Nadler v. FDIC, 92 F.3d 93 (2d Cir. 1996) 29

National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976 ..... 33, 35

National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974)..... *passim*

Sears, Roebuck & Co. v. General Services Administration, 384 F. Supp. 996 (D.D.C. 1974) 24

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973) 7

Statutes and Regulations

5 U.S.C. § 551(2) 9

5 U.S.C. § 552(a)(4)(B) 22

5 U.S.C. § 552(b)(3) 17

5 U.S.C. § 552(b)(4) ..... *passim*

5 U.S.C. § 552(b)(5) 4,7,8,34,35

5 U.S.C. § 552(b)(7) 24

5 U.S.C. § 552(b)(8) 19

12 U.S.C. § 248 17

12 U.S.C. § 343 5

12 U.S.C. § 347b 5

12 C.F.R. § 261.2(i)(1)(i) 13

12 C.F.R. § 261.2(i)(1)(ii) 13, 16

12 C.F.R. § 261.3(a) 13

Other Authorities

Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) 17, 18, 19

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) 19

INTRODUCTION

Petitioner has presented no "compelling reasons" for a writ of certiorari, and relies instead upon pure conjecture regarding the future impact of FOIA disclosure upon the operation of federal lending programs. Petitioner's warnings should not be taken at face value, not least because the Solicitor General has not asked this Court to review the decision and has, in fact, filed as a respondent opposing certiorari review. In any event, this case is not a compelling candidate for Supreme Court review. Applying settled law, the Second Circuit properly determined that reports generated by the Board of Governors of the Federal Reserve System (the "Board") of lending at the Discount Window and other special credit and liquidity programs are government records, not documents "obtained from a person," and that the reports are not "confidential" within the meaning of FOIA Exemption 4. The Second Circuit's determination does not warrant review for four reasons.

First, the issues in this case have been superseded by intervening legislation. Pursuant to comprehensive financial reform legislation enacted this past summer, Congress directed the Board to disclose many of the records that Fox Business had requested in this case by December 1, 2010, which it did. Moreover, under the terms of the new legislation, Congress set out a new legal regime for the release of future Discount Window records, providing them with an express two-year exemption under FOIA, and then mandating their release after that time. Congress has now conclusively addressed

the disclosure requirements the Petition raises and made its policy preferences clear. Any intervention now by this Court is unneeded in light of these legislative developments.

Second, there is no split of authority that warrants review by this Court. No Court of Appeals has ever adopted Petitioner's view that the "obtained from a person" language of Exemption 4 applies to information that, as the Second Circuit put it, is created by "the agency's own executive action." Likewise, there is no meaningful split regarding the so-called "program effectiveness" expansion of Exemption 4. Other than two decades-old opinions from the First and the D.C. Circuits, there has *never* been a case from the courts of appeals (including those circuits) that has recognized, much less applied, the "program effectiveness" test. Against this background, the Second Circuit's decision not to revive those long-quiet cases creates no split worthy of this Court's review.

Third, the absence of the United States as a party seeking review creates a substantial standing problem. Petitioner is a banking association owned by a handful of large commercial banks, not a federal agency.[1] Even if the Petition presented a more urgent question than it does concerning the effectiveness of Federal Reserve lending programs, only a federal agency is entitled to represent federal

---

[1] According to Petitioner, its members are: ABN Amro Bank, N.V.; Bank of America, N.A.; The Bank of New York Mellon; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, N.A.; JPMorgan Chase Bank, N.A.; UBS AG; U.S. Bank N.A.; and Wells Fargo Bank, N.A.

interests as a department of the United States government. Just as the Board is exclusively empowered under the Federal Reserve Act to authorize and oversee emergency lending programs, only the Board can sue to protect its powers under those programs. Petitioner, as an association of eight commercial banks, cannot stand in the shoes of the nation's central bank.

Fourth, the decision below was correct. Significantly, the Court of Appeals heard and decided the appeal in this action in tandem with another appeal, *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143 (2d Cir. 2010) ("*Bloomberg*"), *petition for cert. filed*, 79 U.S.L.W. 3271 (U.S. Oct. 26, 2010) (No. 10-543). The Fox Business FOIA Requests are substantially similar to the requests at issue in the *Bloomberg* appeal and seek the same categories of documents from the Board.[2] In both *Fox News* and *Bloomberg*, the Court of Appeals reached the unremarkable conclusion that information generated by the Board was not the type of information that Exemption 4, with its safeguards for information provided by businesses, was intended to protect. Likewise, the Second Circuit's determination that the information could not be withheld on amorphous "program effectiveness" grounds was also correct and consistent with this Court's decision in *FOMC v. Merrill*, 443 U.S. 340

---

[2] The Fox Business FOIA Requests seek records covering a longer period of time than the Bloomberg requests. In addition, Fox Business seeks the Board's records of pledged collateral, which are located at the regional Federal Reserve Banks ("FRBs").

(1979), in which this Court squarely refused to adopt a similar "public interest" exemption within the context of FOIA Exemption 5.

At bottom, Petitioner asks this Court to review the judgment based on an assertion that the Second Circuit's decision will have harmful economic effects. Pet. at 7-9. But that assertion does not bear scrutiny. Much of the information requested by the Fox Business FOIA Requests has now already been released and publicized without any ill effects. The legal regime that Petitioner claims is vital has never been the law at any time, again without obvious ill effects. And when given the chance to address the issue, Congress acted to *mandate* disclosure in its new legislation. All of these factors taken together, and coupled with the United States' opposition to this Court's review, demonstrate that the Petition should be denied.

STATEMENT

A. The FOIA Requests and the Board's Response.

Fox Business submitted its FOIA Requests in late 2008 after the Board had authorized an unprecedented expansion of the Federal Reserve System's emergency lending programs. Before the financial meltdown of 2008, the primary method traditionally used by the Federal Reserve System to regulate the banking and financial system was to lend money overnight to member financial institutions, primarily through the "Discount Windows" operated by the regional Federal Reserve

Banks ("FRBs"). (J.A. 257).[3] Under the Discount Window system, the FRBs lend money on a short-term basis to eligible depository institutions, *i.e.*, commercial banks, savings and loan associations, savings banks and credit unions. (J.A. 257). All loans obtained through the Discount Windows are secured by collateral. (J.A. 257). Discount Window lending is conducted pursuant to the Board's statutory authority under Section 10B of the Federal Reserve Act ("FRA"), 12 U.S.C. § 347b.

On August 17, 2007, the Board approved temporary changes to the primary credit program of the Discount Window to allow the FRBs to make loans to depository institutions for as long as 30 days. (J.A. 257-58). In December 2007, the Board announced the establishment of the Term Auction Facility ("TAF"), which further expanded primary credit through an auction mechanism. In addition to expanding access to the Discount Window, the Board also created several new lending facilities for borrowers other than depository institutions pursuant to its rarely invoked authority under section 13(3) of the FRA,[4] including the Primary Dealer Credit Facility ("PDCF") and the Term Securities Lending Facility ("TSLF"). (J.A. 258).

The expansion of Federal Reserve lending programs led to a dramatic increase in the amount of loaned public funds. The average outstanding

---

[3] All citations to "J.A. __" are to the Joint Appendix filed in the Second Circuit in the *Fox News* appeal.

[4] Under 12 U.S.C. § 343, the Board may authorize the FRBs to extend credit to any "individual, partnership, or corporation" in "unusual and exigent" circumstances.

amounts loaned under all of the Board's lending programs ballooned from approximately $1 million during the week of August 8, 2007 to more than $188 billion during the week ending December 31, 2008. (J.A. 259). As of December 29, 2010, the balance of primary and other lending from facilities covered by the Fox Business FOIA Requests stood at approximately $26 billion.

On November 10, 2008, Fox Business submitted the first of two FOIA requests, seeking:

> the names of institutions receiving Federal Reserve lending from programs including but not limited to the following: Regular OMOs; Single-Tranche OMO Program; Discount Window; Term Discount Window Program; Term Auction Facility; Primary Dealer Credit Facility; Transitional Credit Extensions; ABCP Money Market Liquidity Facility; Securities Lending; Term Securities Lending Facility; Term Securities Lending Facility Options Program; and any other Federal Reserve lending facility not mentioned above. (J.A.169-70).

The November 10 FOIA Request also sought "an accounting of the collateral provided by these institutions in exchange for the lending." (J.A. 170).

On November 18, 2008, Fox Business submitted a second FOIA request, which sought records of Federal Reserve lending under the same programs during the months of September 2008 and October 2008. This second FOIA request asked the Board to provide not only the name of the borrowing

institutions, but also documents reflecting the amounts borrowed and the collateral pledged by each such institution. (J.A. 64-66). Finally, Fox Business requested information about "the collateral held by the Fed at the close of business on November 14, 2008 [including] information sufficient to match the institutions with the collateral they pledged." (J.A. 64-66).

In a letter dated January 6, 2009, the Board acknowledged that it had documents directly responsive to the November 18 FOIA Request but, citing Exemption 4 and the exemption for inter-agency and intra-agency memoranda separately contained in Exemption 5, refused to disclose those records. (J.A. 72-77).[5] The Board further admitted that records concerning the collateral pledged to the FRBs existed, but took the position that such records were not "records of the Board" subject to the Board's FOIA obligations. (J.A. 81, 270). After Fox Business commenced the instant action in the District Court, the Board provided *Vaughn* indexes for each of the two FOIA Requests,[6] again claiming that it was entitled to withhold all responsive documents in its

---

[5] The Board did not respond to Fox Business's prior FOIA Request until January 16, 2009, when it issued a letter denying the request for the same reasons that the November 18 FOIA Request had been denied. (J.A. 57-62). By that time, Fox Business had already filed the complaint in this action.

[6] In *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), the District of Columbia Circuit adopted a procedure widely followed in FOIA cases, whereby federal agencies submit an index similar to a privilege log, describing the documents for which agencies claim a FOIA exemption.

possession pursuant to both Exemption 4 and Exemption 5.[7]

The *Vaughn* indexes principally identified and described three categories of Board records that contain transaction-level information responsive to the Fox Business FOIA Requests. Specifically, the Board revealed that it possessed and was withholding "Origination Reports" for each business day in the period covered by the Fox Business FOIA Requests. Origination Reports list the prior business day's Discount Window loans by the name of the borrowing institution and contain, among other things, the maturity date, the FRB district, and the amount of each loan. (J.A. 29-30). The Board also withheld "Remaining Term Reports," which similarly contained records of Discount Window lending, organized by the name of the borrowing institution, and contained the origination and maturity dates, the total amount of credit outstanding and the total amount maturing on a specific date. (J.A. 30-31). The *Vaughn* indexes similarly described "Emergency Credit Reports," which reflected borrowing from the newly created special credit facilities for non-depository institutions such as the PDCF and the TSLF.[8]

---

[7] The Board abandoned its claim to Exemption 5 in the appeal before the Second Circuit. Accordingly, only Exemption 4 is relevant to the instant Petition.

[8] The *Vaughn* indexes also identified e-mails and a draft of procedures for monitoring collateral.

B. Exemption 4 and the National Parks Test.

FOIA establishes a strong presumption in favor of disclosure of government records. *Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Under the statute, federal agencies must disclose records unless one of nine enumerated exemptions applies. 5 U.S.C. §§ 552(b)(1) through (b)(9).

The only FOIA exemption at issue in this matter is Exemption 4, which permits the government to withhold, in whole or in part, records constituting (i) "trade secrets and commercial or financial information" (ii) "obtained from a person" and (iii) "privileged or confidential." All three criteria must be satisfied if an agency is to assert Exemption 4. It was undisputed below that the first condition of Exemption 4 was present, *i.e.*, that the records at issue were "commercial or financial information."

With regard to the second part of Exemption 4, whether government records are "obtained from a person" is determined by the definition of "person" supplied in section 551(2), which includes "an individual, partnership, corporation, association or public or private organization *other than an agency*." (Emphasis supplied).

With regard to the third part of Exemption 4, the statute does not supply a definition of the term "confidential". The federal courts have generally followed a two-part test that was first established in *National Parks & Conservation Ass'n v. Morton ("National Parks")*, 498 F.2d 765 (D.C. Cir. 1974), which treats agency records as "confidential" for purposes of Exemption 4 *if* their disclosure would

either: (1) impair the government's ability to obtain necessary information from third parties, or (2) cause substantial harm to the competitive position of the business submitter from which the information was obtained.

In arriving at this two-part test for "confidential" information, the *National Parks* court examined the evidence of Congress's purpose in adopting Exemption 4. The *National Parks* court methodically reviewed the congressional record and reasoned that the core purpose of Exemption 4 was to prevent competitors from using a FOIA request to obtain and then unfairly exploit commercial information that particular business submitters provided to a federal agency. 498 F.2d at 767-70. *National Parks* reasoned that the prospect of a competitor's unrestricted right of access to such information implicated two conjoined interests in confidentiality that Congress intended to protect through Exemption 4, a governmental interest and a private interest. The *National Parks* court therefore explained that its judicial formulation of "confidentiality" within Exemption 4 had a "twofold justification . . . (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must." *Id.* at 769.

The First Circuit and the District of Columbia Circuit have gone a step further and endorsed a third, alternative definition of "confidential," extending it to cover any information the release of which might adversely impact the "effectiveness" of a federal agency's programs. *9 to 5 Org. for Women*

Office Workers v. Bd. of Governors ("9 to 5"), 721 F.2d 1 (1st Cir. 1983); *Critical Mass Energy Project v. Nuclear Regulatory Comm'n ("Critical Mass I")*, 830 F.2d 278, 287 (D.C. Cir. 1987), *overruled by Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993). These circuits relied upon dicta appearing in a footnote in *National Parks*, in which the District of Columbia Circuit recited that "we express no opinion as to whether other *governmental interests* are embodied in this exemption." 498 F.2d at 770, n. 17. (Emphasis supplied).

C. **Proceedings Below.**

It was undisputed in the District Court that the Origination Reports, Remaining Term Reports and Emergency Credit Reports are agency records, generated by the Board itself from the FRBs' daily reporting of Federal Reserve lending to depository and non-depository institutions. Thus, these reports were agency records, presumptively disclosable under FOIA.

The Board sought to overcome the presumption of disclosure by invoking Exemption 4. At the outset, the parties were agreed that the requested information was "commercial or financial" under the first part of the tripartite test in Exemption 4. Only the latter two prongs of Exemption 4 were at issue, *i.e.*, whether the information contained in the reports was "obtained from a person," and whether it constituted "privileged or confidential" information within the meaning of FOIA.

In addressing whether the information was "obtained from a person," the Board identified two possible candidates for the role of "person": (i) the borrowing banks and (ii) the FRBs. Although the reports did not contain particular business information passed on to the FRBs by any borrower (such as the loan application, financial statements or other proprietary information), the District Court (Hellerstein, *J.*) believed that the name of the borrower itself and the mere fact of the loan constituted "information that originated with the borrower." Accordingly, in an opinion dated July 30, 2009, the District Court found that the information listed in the Board's reports was "obtained from a person," *i.e.*, the borrowers, even though the information was actually tabulated by the FRBs as the record of their own executive action in making the loans and then incorporated in the Board's reports. Pet. App. 42-46. Judge Hellerstein did not reach the question of whether the FRBs were "persons" as opposed to agencies for purposes of Exemption 4.

The District Court went on to find that the "confidentiality" prong under Exemption 4 applied because any disclosure, even the mere fact of Discount Window and other FRB lending, would cause harm to the borrower's competitive position by causing a "stigma," potentially leading to a "run on the bank" by nervous depositors. Pet. App. 48. The District Court revealed in particular that its grant of summary judgment to the Board was based on the District Court's concern that "[t]he national economy is not so out of danger, and the frailty of banks so

different now than when their Discount Window borrowing began, as to make the Board's concern academic." *Id.*

The District Court separately held that the Origination Reports and Remaining Term Reports were "confidential" for an additional, independent reason, *i.e.*, not because their release might implicate the borrower's commercial information, but because disclosure might impair a "confidentiality" interest of the Board in the continued effectiveness of its lending programs. Pet. App. 48-51.[9] Thus, neither the confidentiality interest of the "person" from whom the Board asserted the information originated (the borrower) nor the confidentiality interest of the second layer of "persons" (the FRB) through which the information passed was at issue; instead, the interest of the Board (the agency that obtained the information) became the relevant consideration.

However, one month later, on a nearly identical record, the Chief Judge of the same District Court (Preska, *C.J.*) rendered a diametrically opposite decision. *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009). Judge Preska found that Exemption 4 was inapplicable, either under its "obtained from a person" prong or the "confidentiality" prong. First, Judge Preska held that "[t]he only information in the Remaining Term Reports that the FRBNY and other

---

[9] In a ruling not directly relevant to this Petition, the District Court held that records of collateral pledged to the FRBs were not records of the Board pursuant to 12 C.F.R. §§ 261.2(d)(1)(i), 261.2(d)(1)(ii) and 261.3(a), and therefore not subject to FOIA. Pet. App. 32-37.

FRBs could possibly have obtained from the borrowers is the borrowers' name; the FRBs generated all the other information from internal data regarding their lending programs." *Id.* at 277. Under the "confidentiality" prong, Judge Preska noted that the Board had not identified any risk of imminent competitive harm to borrowing banks *from competitors* and rejected as purely conjectural the Board's assertion that release of the information might result in a "run" on the bank. *Id.* at 279-80. In addition, Judge Preska expressly declined to follow Judge Hellerstein's adoption of the "program effectiveness" test. *See id.* at 278-79, n. 15.[10]

After a nearly two-hour long consolidated oral argument on January 11, 2010, the Second Circuit reversed Judge Hellerstein's judgment in the *Fox News* case and affirmed Chief Judge Preska's judgment in the *Bloomberg* case. By twin decisions entered on March 19, 2010, the Second Circuit held that the identity of a bank that borrowed from the Federal Reserve, the dollar amount of the loan, the origination and maturity dates and the collateral securing the loan were records of executive action, not information "obtained from a person" (*i.e.*, the borrowing banks) under the second prong of Exemption 4. *Bloomberg,* 601 F.3d at 147; *Fox News*, Pet. App. 10. Therefore, the Second Circuit did not reach the question of whether such

---

[10] The Board did not attempt to argue that disclosure of the reports would impair the Board's ability to obtain necessary information from depository institutions in the future in either the *Fox News* case or the *Bloomberg* case. Thus, the first part of the *National Parks* test for confidentiality is not at issue.

information was "confidential" from the point of view of the borrower.

Having decided that the borrowers were not "persons" from whom the requested information was obtained, the Second Circuit proceeded to consider the Board's alternative argument that the FRBs qualified as "persons" for purposes of Exemption 4's tripartite test. The Second Circuit declined to resolve that question because, even if the information in the Remaining Term Reports were obtained by the Board "from a person" (the FRBs), Exemption 4 was still inapplicable because those reports were not "confidential" from the FRBs' point of view. Competitive harm to the borrowers was irrelevant for this purpose if the "persons" from whom the information was obtained were the FRBs. Since the record did not show that the FRBs are subject to competition in the marketplace, or that the disclosure of the requested information would otherwise cause competitive injury to the FRBs, the Second Circuit concluded that the records could not be confidential under the *National Parks* test. *Bloomberg*, 601 F.3d at 150.

Since the Board had not demonstrated that its records could be confidential under the traditional *National Parks* test, the Second Circuit considered whether the *National Parks* test of an agency record's confidentiality should be judicially expanded to include information which—if disclosed—could impair the "program effectiveness" of the Discount Window or other Federal Reserve lending facilities. The Second Circuit held that adoption of the "program effectiveness" test would give

impermissible deference to federal agencies, allowing them to avoid disclosure under FOIA based upon their own say-so. The Second Circuit noted that this Court had already rejected an equivalent "public interest" exemption over thirty years ago in *FOMC*.

In the *Fox News* appeal, the Court of Appeals confronted a question not presented in the *Bloomberg* appeal, namely, whether records reflecting the pledge of collateral to the FRBs constituted records of the Board subject to FOIA. The panel reversed Judge Hellerstein's judgment and remanded with instructions to determine whether any of the FRB records relating to collateral were maintained "for administrative reasons" and, hence, records of the Board pursuant to 12 C.F.R. § 261.2(i)(1)(ii), and to determine the scope of Fox Business's requests for collateral information. Pet. App. 14-16.

The Second Circuit denied the Board's motion for rehearing and rehearing *en banc* by an order entered on August 20, 2010. Pet. App. 5-6.

D. The Dodd-Frank Act.

On July 21, 2010, the President signed into law the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"). Dodd-Frank contains provisions that make substantial changes to the Board's disclosure obligations. Specifically, §1109(c) of the Act required the Board to disclose on its website transaction-level data regarding FRB loans under the PDCF, TSLF and TAF. The Board complied with the disclosure requirement on

December 1, 2010, publishing the identity of borrowers, loan amounts, interest rates and the dollar value of pledged collateral. Accordingly, many of the records at issue in this case became public. Within scant minutes of the Board's disclosure of those records, Respondent Fox Business Network and other media companies broadcasted the information on live television, in print and over the Internet. Publication of these documents on the Board's website did not result in a "run on the bank"; the Dow Jones Industrial Average closed up at the end of the day's trading and has trended upward since that time (as have the shares of Petitioner's member banks); and the disclosures otherwise quickly became "yesterday's news."

Dodd-Frank also contains provisions that change the Board's disclosure requirements going forward. Section 1103(b) of the Act directs the Board to publish data regarding all future Discount Window borrowing within two years of the origination of the loan. In return, Dodd-Frank creates an explicit statutory FOIA exemption pursuant to 5 U.S.C. § 552(b)(3) ("Exemption 3") to cover the two-year interval between loan origination and mandatory Board disclosure. *See* Dodd-Frank Act at § 1103(b) (amending 12 U.S.C. § 248). Thus, the application of Exemption 4 to records of Federal Reserve lending activities is an almost entirely academic question.

E. Intervention.

Petitioner was not a party to the *Fox News* appeal in the Second Circuit. However, after the Solicitor General elected not to seek further review, on

October 26, 2010, Petitioner moved to intervene and stay the issuance of the mandate in this action pending the outcome of this Court's disposition of the petition in the *Bloomberg* case or, in the alternative, to allow Petitioner to file the Petition in the instant case. The Second Circuit granted the motion by order dated November 16, 2010. Pet. App. 1-2.

REASONS FOR DENYING THE WRIT

I. The Case is a Poor Vehicle for Considering the Questions Presented Because the Issues Are Already Largely Moot In Light of Superseding Legislation.

Petitioner concedes that a significant part of this case will have become moot by the time the Court disposes of the Petition. Pet. at 7-8 & n.4. Indeed, it already has. As explained above, pursuant to §1109(c) of Dodd-Frank, many of the documents at issue in this case were disclosed on the Board's website on December 1, 2010. That disclosure by itself is sufficient to make review by this Court in this case unwarranted, but Dodd-Frank goes even further by changing the very legal framework that Petitioner is asking this Court to address. As noted, Dodd-Frank creates a new FOIA exemption that allows the Board to withhold Discount Window records created after the Act's enactment for two years after origination, but then mandates their disclosure after that time. Congress's normative, legislative judgment regarding the need to protect borrowing banks from FOIA disclosure is therefore unmistakably clear: the Board and the depository institutions that borrow from the Discount Window

do not require protection from FOIA disclosure for any longer than two years after the origination of a loan. There is no need for this Court to determine what FOIA requires in this context when Congress has now definitively spoken on the subject.

To be sure, Dodd-Frank does not address Discount Window records created before the passage of Dodd-Frank, but this Court should not grant review to address the disclosure obligations for that small category of records, a category the importance of which is diminishing with each passing day. First, Congress could have chosen to expand the FOIA exemption in Dodd-Frank to such records, but it did not do so, making such records presumptively disclosable under FOIA.[11] Second, to the extent that any of the borrowers that were identified on the Board's website on December 1, 2010 are also listed in the Remaining Term Reports, the fact that those

---

[11] Significantly, from the inception of FOIA, Congress has always known how to exempt data regarding financial institutions from disclosure where, *in its view*, secrecy would serve the public interest. Notably, Congress expressed its concern that private financial data, "if indiscriminately disclosed, [could] cause great harm" by enacting 5 U.S.C. § 552(b)(8), which exempts from disclosure information obtained in "examination, operating, or condition reports" prepared in the course of an agency's supervision of a financial institution. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). Thus, Congress has now had at least two occasions on which to consider the degree of protection that Federal Reserve records require from FOIA. The absence of an express provision for pre-2010 Discount Window records – either in FOIA, the Federal Reserve Act or, now, in Dodd-Frank – suggests that no such exemption from the general rule of disclosure was intended.

borrowers used emergency Federal Reserve lending during the financial crisis is already in the public domain. And in any case, records of past Discount Window borrowing as a class are stale and becoming increasingly more stale. Their staleness is particularly clear in the context of this case given that all such records sought by Respondent date from 2007 and 2008. Their age thus exceeds the two years that Congress determined was the appropriate time for disclosure for future records. Moreover, as a result of the expiration of the non-Discount Window facilities, the abatement of the financial crisis and the prospective disclosure of future Discount Window borrowing, the federal courts are unlikely ever to be presented again with the issue of whether the records of such past borrowing should be withheld under FOIA Exemption 4. Thus, to the extent that the action is not moot as a matter of law, it is moot as a practical matter and is therefore not a compelling case for this Court's review.

II. Review Is Unwarranted Because Petitioner's Claim Of A Circuit Split Is Unfounded.

Petitioner contends that review is warranted because the Second Circuit's decision in *Bloomberg* and *Fox News* departs from those of other courts. That is incorrect. With respect to the first question posed by the Petition – the meaning of the phrase "obtained from a person" under Exemption 4 – no Court of Appeals has ever adopted the interpretation that Petitioner urges. Instead, as the Second Circuit explained, Petitioner's position would for the first time exempt "disclosure of the agency's own executive actions." *Bloomberg*, 601 F.3d at 148-49.

Petitioner contends that the D.C. Circuit has adopted its position (Pet. at 29), but neither of the cases it cites even mentioned the "obtained from a person" requirement, let alone adopted an interpretation opposed to the Second Circuit's. *See Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37 (D.C. Cir. 2008); *McDonnell Douglas Corp. v. Nat'l Aeronautics and Space Admin.*, 180 F.3d 303 (D.C. Cir. 1999). Instead, as the Second Circuit expressly recognized, its position follows the D.C. Circuit's determination in *Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403–04 (D.C. Cir. 1980), that the exemption is "restrict[ed] ... to data which have not been generated within the Government." *Bloomberg*, 601 F.3d at 148. Petitioner does not even cite *Board of Trade*, and the rest of its discussion is limited to district court cases that, as we explain below, are off-point as well. *See infra*.

As for Petitioner's claim of a split in authority regarding the so-called "program effectiveness" variation of Exemption 4, any split is shallow and stale at most. Although, as the Second Circuit acknowledged, both the First and D.C. Circuits have described such a theory, there is less to this "circuit split" than meets the eye. In the first place, the First Circuit's determination in *9 to 5* is nearly 30 years old, and the D.C. Circuit's determination in *Critical Mass* is nearly 20 years old. In the time since they were decided there has not been a *single* Court of Appeals case – from any circuit – applying the

program effectiveness exception.[12] Given the total dearth of such cases, even from the two circuits that purportedly recognize the exemption, the split does not constitute a pressing issue in the lower federal courts.

Moreover, it is not even clear that there has ever been a case that turned on the program effectiveness exception. In *9 to 5*, the First Circuit's discussion of the "program effectiveness" test was dicta because the holding was based upon the first prong of the traditional *National Parks* test. As it turned out, the First Circuit affirmed the Boston FRB's decision to withhold records on the ground that persons with "necessary information . . . may decline to cooperate with officials and *the ability of the Government to make intelligent, well informed decisions will be impaired.*"[13] 721 F.2d at 10 (citing *National Parks*, 498 F.2d at 767). (Emphasis in original).

The "program effectiveness" theory in Exemption 4 received a similarly ambiguous treatment in the *Critical Mass* case in the D.C. Circuit. A panel of the D.C. Circuit held in 1987 that agency records *could*

---

[12] District court cases are barely more plentiful. In the nearly 30 years since *9 to 5*, there appear to be fewer than a half dozen cases addressing the exception.

[13] The persuasive authority of the First Circuit's holding in *9 to 5* is also open to question because it applied a deferential standard of review to the FRB's determination to withhold the salary records at issue in that case. *9 to 5*, 721 F.2d at 10. No such deference is permitted under FOIA, which expressly prescribes *de novo* review. 5 U.S.C. § 552(a)(4)(B). *See also DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989). Notably, then-Judge Breyer was on the panel that decided *9 to 5*, but filed a dissenting opinion.

be deemed confidential for purposes of Exemption 4 if, as a result of a FOIA request, the NRC were obliged in the future to obtain the information at issue through subpoenas or regulatory compulsion, rather than by voluntary cooperation. *See Critical Mass I*, 830 F.2d at 286. *Critical Mass I* simply held that if it were proved on remand that resort to those more cumbersome methods impaired the functioning of the NRC, withholding might be permissible. However, following remand by the panel in *Critical Mass I* to the district court and a subsequent appeal before a different panel, the D.C. Circuit overruled *Critical Mass I* in an en banc rehearing. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993). In the end, the D.C. Circuit's determination that the records could be withheld under Exemption 4 did not turn upon the "program effectiveness" test at all. Rather, the en banc court based its final judgment upon the determination that the records had been voluntarily supplied to the NRC and that the traditional *National Parks* test only applied where an agency obtained such information by legal compulsion. Significantly, in doing so, the D.C. Circuit appeared to return the "program effectiveness" test to its previously unresolved state.[14] Against this background, the Second

---

[14] "Although we overrule our decision in *Critical Mass I*, we note that the panel there adopted the First Circuit's conclusion that the exemption also protects a governmental interest in administrative efficiency and effectiveness. . . And today, of course, we recognize a private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis. We offer no opinion as to whether any

Circuit's determination not to adopt "program effectiveness" as a test for the confidentiality of documents under Exemption 4 creates no circuit split that warrants this Court's review.

III. Petitioner Lacks Standing To Assert Harm To The Effectiveness Of Federal Reserve Lending Programs.

Even if the consideration of "program effectiveness" in the context of Exemption 4 represented a live issue among the Circuits, Petitioner does not have standing to raise that issue in this Court. Only a federal agency has a cognizable interest in the impact of FOIA exemptions on the operation of federal programs. *See, e.g., Hercules, Inc. v. Marsh,* 839 F.2d 1027 (4th Cir. 1988) (only the Army, not a reverse-FOIA plaintiff, can assert potential harm to Army's ability to obtain necessary information in the future). *See also Sears, Roebuck & Co. v. Gen. Serv. Admin,* 384 F. Supp. 996, 1004 (D.D.C. 1974) (private litigant has no standing to assert FOIA exemption 552(b)(7) for records relating to ongoing government investigation, which is designed solely to protect agency's interests). Not surprisingly, neither the First Circuit in *9 to 5*, the District of Columbia Circuit in *Critical Mass*, nor the legislative history upon which the *National Parks* court relied give any indication that Congress intended to appoint business submitters as "private attorneys general" for purposes of defending *government* interests under FOIA.

---

other governmental or private interest might also fall within the exemption's protection." 975 F.2d at 879.

Moreover, even if the Court were satisfied that the Petitioner or its members had a sufficient interest in the viability of Federal Reserve lending programs to acquire Article III standing, and even if the question presented were of sufficient importance to merit review in this Court, this would still be the wrong case in which to resolve the question. If this Court is to resolve whether records are "confidential" under Exemption 4 because their disclosure might impact the effectiveness of a federal agency's programs, the better vehicle for such a discussion would be a case in which the Solicitor General has elected to seek review on behalf of the affected agency. Here, the United States has elected not to appeal from the Second Circuit's judgment. Nor can it be assumed that Petitioner or its member banks on the one hand and the Board on the other have a complete unity of interests where the "effectiveness" of Federal Reserve lending programs is concerned. Quite the opposite: Petitioner does not regulate the money supply or have responsibility for promoting stability in the national economy. Accordingly, the Clearing House Association is the wrong party to bring the questions presented in the Petition.[15]

---

[15] In addition, Fox Business respectfully submits that the Second Circuit improvidently granted Petitioner leave to intervene because Petitioner lacks associational standing to assert any private interest in the confidentiality of the Board's records. Where the proposed intervenor is a membership association, it must be shown that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in

IV. The Decision Below Was Correct On The Merits.

Apart from failing to satisfy the standards for review on a writ of certiorari, the Petition fails because the Second Circuit's decision was plainly correct.

A. The Court of Appeals Correctly Found That the Remaining Term Reports and the Origination Reports Were Not "Obtained From a Person."

The Second Circuit correctly applied Exemption 4 and found that the information contained in the Board's reports constituted records of agency action, not commercial information supplied by a business submitter. The Second Circuit properly recognized that while raw data typically contained in a bank's application for short-term credit (*e.g.*, profit and loss information, reserves, accounts receivable or other

---

the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). To meet that burden, an association must identify one or more members allegedly affected by the litigation and factual circumstances that would enable the court to evaluate the potential harm. *American Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 50-52 (D.D.C. 1998), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000). But Petitioner never identified a single member who borrowed from the Federal Reserve, much less one that has a concrete commercial interest that could be impaired by implementation of the judgment. And even if Petitioner had "named names," which it declined to do below, its standing would *still* be in question because it failed to plead that any one of its identified members will suffer an "injury in fact," which is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

financial information relevant to a FRB's assessment of a borrowing bank's risk) would be the classic variety of information "obtained from a person" that Exemption 4 sought to protect, the information contained in the Remaining Term Reports were nothing of the kind. Rather, the information sought by the Fox Business FOIA Requests constituted nothing more than records of lending by the FRBs under the authority of the Board.

Petitioner attempts here, as the Board did below, to characterize the identity of a borrowing bank—its name, and nothing more than that—as an item of information obtained by the agency "from a person." Thus, for example, Petitioner urges that "[b]oth appeals concern Board reports reflecting highly confidential information *about the identities of banks* that borrowed through certain Board lending programs . . ." Pet. at 4. (Emphasis supplied). The Second Circuit easily saw through this wordsmithing. That loans were given to particular banks in particular amounts are objective facts that came into existence only after the transactions were consummated. Thus, in a directly analogous case involving loans by the Small Business Administration, the district court in *Buffalo Evening News v. Small Bus. Admin.*, 666 F. Supp. 467, 469 (S.D.N.Y. 1987), held that Exemption 4 did not authorize withholding records identifying "individual loan amounts, . . . outstanding balances and payment, collection, or discharge status," as that information had been generated by the government and "in no way implicate[d] any of the financial information provided by the borrowers to the

government." The Second Circuit properly followed this reasoning in *Bloomberg*. "True, disclosure of loan terms allows one to back into information about the borrower; inferences may be drawn that the bank that got the loan asked for it . . . The fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA." *Bloomberg*, 601 F.3d at 148. (Emphasis in original; citations omitted).

The Second Circuit's delineation between commercial information supplied by a business on the one hand and the record of an agency's dealing with that business on the other finds ample support in decisions of this Court and other federal courts. Indeed, this Court explained in *FOMC* that information generated by the government itself is not information "obtained from a person." *FOMC*, 443 U.S. at 360. *See also Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006) ("materials implicating Exemption 4 are generally not developed within the agency"). It follows that when the Board creates an internal record of lending by the Federal Reserve System, it has generated precisely the sort of information that FOIA was intended to make available to an educated public – information regarding what the government is up to.

Petitioner attempts to justify certiorari review on the ground that the Second Circuit's analysis of whether the Board's records of FRB lending were "obtained from a person" would disrupt other federal programs that purportedly depend upon maintaining

the confidentiality of commercial transactions with federal agencies. *See* Part I.A of the Petition, at 25-30. Petitioner's domino theory fails, however, for a number of reasons.

The most immediate and obvious problem with Petitioner's argument is that it conflates the "confidentiality" prong of Exemption 4 with the separate, antecedent question of whether the information contained in a government record was "obtained from a person" in the first instance and not by the agency. While Petitioner nominally discusses in Part I.A whether the information recorded in the Remaining Term Reports was "obtained from a person," on closer examination Petitioner has actually changed the subject, leading the Court into a discussion of Exemption 4's confidentiality prong and the merits of the "program effectiveness" theory. Pet. at 30-31. Unfortunately for Petitioner, the plain language of the statute does not allow that kind of a detour. By its language, Exemption 4 has three constituent parts, exempting from disclosure only those records that constitute: "[1] trade secrets and commercial or financial information [2] obtained from a person and [3] privileged or confidential." On its face, Exemption 4 applies only if *all three* criteria are satisfied and the federal courts have repeatedly so held. *See, e.g., Inner City Press/Community on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006); *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996); *Getman v. N.L.R.B.*, 450 F.2d 670, 673 (D.C. Cir. 1971). Taken to its logical conclusion, the Petition would extend Exemption 4 automatically to any record of a

transaction between the government and a private business entity so long as the business could articulate an interest in keeping its dealings confidential. In other words, Petitioner would have the Court either skip the statutory requirement that the subject information have been "obtained from a person" or treat it as automatically satisfied if the element of confidentiality is present. Petitioner's "two for the price of one" argument therefore violates the canon of statutory construction that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Petitioner musters a series of lower court decisions in which it states that "courts have held or assumed that a third party's commercial dealings with the government consist of information 'obtained from a person.' " Pet. at 26. Those decisions, however, are either readily distinguishable from the instant case or, as Petitioner unwittingly concedes, "assumed" that the relevant information was "obtained from a person" without much analysis. For example, *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19 (D.D.C. 2000), cited by Petitioner, involved records that constituted "summaries or reformulations" of information supplied to the Export-Import Bank, *i.e.*, the insurance applicants' financial information and/or export plans contained in their applications for export insurance. *Id.* at 28-29. *Judicial Watch* is distinguishable on its face from the instant case. As the Second Circuit observed, "Bloomberg's [and Fox News's] FOIA request does not seek loan

applications; it seeks documents that show what loans the Federal Reserve Banks actually made." *Bloomberg*, 601 F.3d at 148. [16]

Similarly, Petitioner relies upon *Clarke v. U.S. Dep't of Treasury*, No. 84 Civ. 1873, 1986 WL 1234 (E.D. Pa. Jan. 28, 1986) for the proposition that the names and addresses of registered institutional owners of "Flower bonds" issued by the Treasury were information "obtained from a person" under Exemption 4. The unreported decision in *Clarke* contained no analysis at all of the "obtained from a person" issue.

According to Petitioner's logic, the Board's records of Federal Reserve lending are necessarily "obtained from a person" under Exemption 4 "because *every* commercial transaction by a third party with the government reflects both third-party and government action; the transaction voluntarily entered into by the third party would not exist but

---

[16] Another decision involving the Export-Import Bank, *Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank of the U.S.*, 464 F. Supp. 804 (D.D.C. 1979), is of even less help to Petitioner because it did not analyze clearly how the requested information was obtained "from a person." In fact, *Comstock* was at war with itself on this very question, reciting at one point that the loan agreement in question was "obtained from a person" because it was not obtained from a federal agency (*see id.* at 806) and then stating in the next breath that "the information contained in the loan agreement is not submitted to the government but rather generated by it through Eximbank's participation in the negotiation process." *Id.* at 807. Thus, the district court decision in *Comstock* provides no sound analytical basis for finding that Federal Reserve lending records were obtained "from a person."

for government approval and involvement." Pet. at 25. (Emphasis in original). But this argument proves too much. The purpose of FOIA was to make it easier for the public "to be informed about what [its] government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). Taken to its logical conclusion, Petitioner's argument would mean that records of the government's commercial dealings with third parties cease to reflect what the *government* is "up to" simply because they correspondingly say something about what the *third party* is "up to" as the counterparty to the government's commercial transaction. The Second Circuit properly rejected that construction, observing that "it cannot be said that the government 'obtained' information as to its own acts and doings from external sources or persons." *Bloomberg*, 601 F.3d at 149.

Petitioner adds a follow-on argument, asserting that the Board should have been allowed to withhold exempt information that is "inextricably intertwined" with non-exempt data. Pet. at 31-33 (citing 5 U.S.C. 552(b)). In essence, Petitioner concedes that the reports sought by Fox Business contain non-exempt information (the record of Federal Reserve lending activity), but asserts that, because the same information reveals the banks' identities, as well as the terms on which those banks applied for, and then accepted, short-term credit, the information is also exempt and "intertwined" with the Board's records. *See id.* This second argument is simply another way of stating the first, *i.e.*, that the identity of a borrower and the fact of the FRBs' lending is

information "obtained from a person" rather than reported by the FRBs and incorporated in a report of the Board. Since there is no "confidential" information to be "intertwined," the Petition should be denied.[17]

---

[17] Since the Second Circuit determined that the information at issue was not "obtained from" the borrowers, it did not proceed to the third prong of Exemption 4 and address whether any of the borrowing banks would face competitive harm from disclosure of the reports. Even if this Court were to reverse the Second Circuit's determination that the affected records were not "obtained from" the borrowers, review in this Court would be futile because the record below still does not contain particularized evidence that any single borrower faced a threat of competitive harm. Just as Petitioner has failed to plead associational standing, *see* Point II.B, *supra*, the record does not permit a finding of competitive injury under the second prong of *National Parks*. Indeed, after remand in the *National Parks* case, the district court conducted evidentiary hearings, examining the likelihood of competitive injury from release of Park Service records as to each of the seven affected concessioners. *See National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) ("National Parks II"). Upon review, the D.C. Circuit affirmed the district court's judgment in favor of the Park Service as to five of the seven concessioners, but found that the record did not substantiate a risk of competitive harm as to the other two. "Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA." *National Parks II*, 547 F.2d at 680. Here, by contrast, the Board never tried to adduce evidence of an individualized likelihood of competitive harm to the institutions that borrowed from the Federal Reserve. Instead the Board—and now Petitioner—offered the conclusory assertion that disclosure of Federal Reserve borrowing carries a "stigma" for all of the borrowing banks. This would not have passed muster under *National Parks II*. If the Board had been correct in asserting that disclosure would have resulted in competitive harm,

B. The Court of Appeals Correctly Declined to Recognize the "Program Effectiveness" Test.

In a final effort to conjure up an issue worthy of certiorari review, Petitioner seizes upon the Second Circuit's rejection of the "program effectiveness" theory in *Bloomberg*, asserting that the test has been endorsed by two other Circuits. As we have explained, however, the program effectiveness exception has never actually prevented the disclosure of any record, *see supra*, and the Second Circuit correctly rejected those precedents in light of controlling authority from this Court.

As the Second Circuit correctly observed, the proposed "program effectiveness" expansion of Exemption 4 is the "functional equivalent" of a similar "public interest" test that this Court squarely rejected in FOMC over 30 years ago. *Bloomberg*, 601 F.3d at 150. In *FOMC*, 443 U.S. at 353-54, this Court found the "public interest" standard fundamentally incompatible with FOIA's policy of public disclosure:

> [The FOMC's] principal argument, instead, is that Exemption 5 confers general authority upon an agency to delay disclosure of inter-agency memoranda *that would undermine the effectiveness of the agency's policy* if released immediately. . . We must reject this analysis . .

---

particularized evidence could have been adduced under seal to substantiate that assertion. Following *National Parks II*, the competitive position of each bank would be different. Absent such evidence, Exemption 4 cannot apply on the basis of any private interest in the confidentiality of the Board's records.

> . . Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda . . . whenever the agency concluded that disclosure would not promote the "efficiency" of its operations or would otherwise not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest standard." (Emphasis added).

In *Bloomberg*, and hence in this case, the Second Circuit correctly held that, like the "public interest" standard in *FOMC*, the proposed "program effectiveness" standard would allow a federal agency to frustrate FOIA disclosure upon little more than its own *ipse dixit*. 601 F.3d at 151. In the final analysis, the Court of Appeals' holding comports fully with FOIA's statutory purpose and is faithful to well-established precedents of this Court. Accordingly, no compelling reason exists to revisit the Second Circuit's judgment.[18]

---

[18] In the event that this Court should grant the *Bloomberg* petition for a writ of certiorari, Fox Business respectfully submits that the petition in this matter should be granted and consolidated for argument with *Bloomberg*. The two petitions present precisely the same issues and the cases were heard simultaneously by the Second Circuit. They come to this Court via separate petitions only because Respondent had previously intervened in *Bloomberg*, but had to delay its petition in this case until it obtained leave to intervene from the Second Circuit.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

STEVEN G. MINTZ
Counsel of Record
MINTZ & GOLD LLP
470 Park Avenue South
New York, N.Y. 10016
(212) 696-4848
mintz@mintzandgold.com

MATTHEW S. HELLMAN
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, D.C. 20001
(202) 639-6000